Supreme Court, U.S.
FILED

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No. 00-

IN THE

# Supreme Court of the United States

DOROTHY D. DAVIS,

*Petitioner,*

*v.*

ROBERT NICHOLS, Individually, and in his capacity as Director; CHARLENE DAVIS, Individually and in her capacity as Director; THOMAS J. WALSH, Chairman; SHARON K. SPENCE, Secretary; WILLIAM C. ALUMBAUGH, Member; ROXANA HAUSER, Member; JACKSON COUNTY BOARD OF ELECTION COMMISSIONERS; and JACKSON COUNTY ELECTION BOARD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

THERESA D. O'TOOLE
Law Offices
Seven Main Street
Parkville, Missouri 64152
(816) 505-1600

MARION E. WINTER
*Counsel of Record*
Winter Law Office
Seven Main Street
Parkville, Missouri 64152
(816) 505-1600

*Attorneys for Petitioner*

164551

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

42 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Did the District Court misinterpret decisions of this Court in ruling that a public employee who was constructively discharged after exposing a supervisor's misuse of public funds, employees' time, and resources in carrying out work for a nonprofit association could not establish a prima facie case under 42 U.S.C. § 1983 because she did not speak on a matter of public concern?

II. Did the Eighth Circuit deny the Petitioner her right to Due Process under the Fifth and Fourteenth Amendments by summarily affirming, in an unpublished per curiam opinion, the District Court's grant of summary judgment pursuant to 8th Cir. Rule 47B?

## LIST OF PARTIES TO THE PROCEEDING

The Petitioner, who was the Plaintiff below, is Dorothy D. Davis.

The Respondents, who were the Defendants in the District Court action, are Robert Nichols, Individually, and in his capacity as Director; Charlene Davis, Individually and in her capacity as Director; Thomas J. Walsh, Chairman; Sharon K. Spence, Secretary; William C. Alumbaugh, Member; Roxana Hauser, Member; Jackson County Board of Election Commissioners; and Jackson County Election Board.

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## OPINIONS BELOW

The unpublished Order of the United States Court of Appeals for the Eighth Circuit, No. 00-1258, is reproduced at page 1a of the Appendix.

The unpublished Order of the United States District Court for the Western District of Missouri, Case No. 98-0620-CV-W-1, is reproduced at page 3a of the Appendix.

## STATEMENT OF JURISDICTION

The Order sought to be reviewed was filed by the United States Court of Appeals for the Eighth Circuit on October 11, 2000, in response to the Petitioner's appeal from the District Court's Order.

The original unpublished Order of the United States District Court for the Western District of Missouri, Western Division, was filed on December 3, 1999.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), which permits review by writ of certiorari "in any civil or criminal case, before or after rendition of judgment or decree."

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Title 42, Section 1983, of the United States Code states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## RULES OF COURT

Appellate Rule 47 ("Local Rules by Courts of Appeals") states:

> (a) **Local Rules.**
>
> (1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.
>
> (2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of nonwillful failure to comply with the requirement.
>
> (b) **Procedure When There Is No Controlling Law.** A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the

> circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Local Rule 47B ("Affirmance or Enforcement Without Opinion") of the United States Court of Appeals for the Eighth Circuit states:

> A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:
>
> (1) a judgment of the district court is based on binding of fact that are not clearly erroneous;
>
> (2) the evidence in support of a jury verdict is not insufficient;
>
> (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or
>
> (4) no error of law appears.
>
> The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. *See* 8th Cir. R. 47B"; or "ENFORCED. *See* 8th Cir. R. 47B."

## STATEMENT OF THE CASE

### A. Jurisdiction of the Courts Below

The United States Court of Appeals for the Eighth Circuit, the order of which is sought to be reviewed in this Petition, had jurisdiction of this matter pursuant to 28 U.S.C. § 1291 ("Final decisions of district courts"), which states in part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

The United States District Court for the Western District of Missouri had jurisdiction over this case pursuant to 28 U.S.C. § 1331 ("Federal question"), which provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United states.

### B. Facts

The Petitioner Dorothy D. Davis was employed as an accounting coordinator by the Jackson County Board of Election Commissioners ("Board"). The Board is a county governmental unit created by statute. Dorothy Davis' duties included keeping the books for various accounts used to maintain funds allocated to the administration of elections and to Board offices. A significant part of her job was to help the Board auditor obtain information for election audits, which were performed routinely after each election.

On June 14, 1997, Dorothy Davis was confronted by her supervisor, Charlene Davis, regarding her use of office time for personal calls necessitated by her personal and family problems at the time. Prior to this incident, Dorothy Davis had an exemplary work record. She had never been reprimanded and no negative actions had ever been placed in her file. She had never been administratively disciplined for any difficulty with her job.

Insulted by the manner in which her supervisor handled the issue, Dorothy Davis quit on the spot. She later requested reinstatement by the Board, which held a special meeting on July 18, 1997, to consider her request.

At that meeting, Dorothy Davis was asked by the chair of the Board to explain the stress that she had been complaining about. She stated that one source of her stress was the large amount of time that her supervisor Charlene Davis had required her to expend to do work for a professional organization of which her supervisor was national treasurer at the time. The organization was the International Association of Clerks, Recorders, Election Officials and Treasurers ("Association").

Dorothy Davis explained to the Board that this work included travel for the Association in addition to her normal business hours with the Election Commission. She expressed her concerns to the Board about the time and effort that she was required to spend on this activity, which did not relate directly to the work of the Board. She informed the Board that about 80 percent of her time on the job was devoted to the Association's activities.

At the conclusion of the meeting, the Board unanimously voted to reinstate Dorothy Davis but place her on six months' probation.

In addition to being a source of Dorothy Davis' job-related stress, her work on behalf of the Association clearly constituted Charlene Davis' use of Board personnel and resources that was not directly related to Board activities and therefore could be improper. Therefore, following the meeting of June 18, 1997, the Board took action to review the use by Charlene Davis of Board time, personnel, and resources for functions of the Association. As a result of this review, the Board issued a directive on July 24, 1997, pursuant to a unanimous motion, that an oral reprimand be given to Charlene Davis and to Board director Robert C. Nichols. The reprimand was based on

> their failure to recognize an employee problem and to counsel the employee [Dorothy Davis] when they knew or believed outside interests were interfering with her ability to perform her duties for the Board.

The Board also directed that an audit be conducted regarding the time expended for Association activities. The auditor reported in October, 1997, that no County resources had been misused but raised concerns about the situation. The auditor requested that the Board "adopt specific detailed guidelines" as to "what is acceptable participation beyond the scope of purely educational activities in trade associations." The report cited "lapses" in proper policy, which it attributed to a "lack of procedures." The report also cites a possible lack of judgment in the execution of Board duties by the Board director involved.

After this report was submitted, two Board members responded in a manner that was even more critical of the travel time and expense, overtime, phone calls, and the use of Dorothy Davis' time by Charlene Davis in her capacity as an officer of the Association. These Board members suggested that the audit be continued under the auspices of another auditor.

The audit and the underlying issues became a matter of interest by the local and area press. One newspaper noted that an unnamed employee of the Board (Dorothy Davis)

> was forced to travel to Philadelphia and Nashville, Tenn., for association work and handled the bulk of local tasks necessary for the group, sometimes working entire days for the organization while being paid by the county.

Other newspaper headlines read:

- "Election Official's Extra Work Draws Fire";
- "Election Commissioner Refuses to Return Confidential Papers";
- "Election Board Query Sought"; and
- "Officials Question Use of Staff for Outside Group."

This issue caused dissension among the Board members. Board meetings became contentious during this period. Following the July, 1997, Board meeting at which Dorothy Davis expressed her concerns about the Association work that her supervisor required of her, her supervisor, Charlene

Davis, began a personal campaign against her. Charlene Davis began to impose upon her miserly restrictions about copy machine usage and sent her numerous memos dealing with insignificant issues or imposing petty requirements on her. For example, Dorothy Davis was suddenly required to speak directly to a supervisor when taking a sick day, rather than leaving a message on a voice mail system. She was now required to account for all long distance telephone calls. As a result of these incidents, the Board Chair, who had been an ally of Charlene Davis during the controversy involving the Association, extended Dorothy Davis' probation for another six months.

Nearly every week following the July 18, 1997, Charlene Davis found some excuse to issue a memorandum to Dorothy Davis or complain in some other way about her job performance. In November, 1997, she found it necessary to compose a detailed letter to the Board directors explaining her action and her use of long distance phone calls. Eventually, Dorothy Davis found her employment situation intolerable. Realizing that she soon would be fired or would be forced out of her position, she began to look for another job. She resigned her position on March 13, 1998, as a result of her constructive discharge.

Dorothy Davis has contended throughout these proceedings that her constructive discharge was deliberate and forced her to seek new employment out of her fear of being terminated in retaliation for the controversy involving the work she was required to perform on behalf of the Association. She had sent a letter to all of the Board's commissioners asking for help and informing that she feared retaliation for her statements about her work for the Association. In fact, the commissioners were not sure why Dorothy Davis had been placed on a second probation by the Board Chair.

Dorothy Davis stated in a deposition that actions taken against her by Charlene Davis were "in retaliation" for Dorothy's statements at the July, 1997, Board meeting. Dorothy later learned that Charlene Davis had kept a file on her after the July, 1997, meeting in an effort to build a case against her.

Although Dorothy Davis was able to find other work, she would have preferred to remain in her former job as an accounting coordinator. She alleged in her action that, as a direct result of her constructive discharge, she suffered mental anguish, the loss of her job, the loss of self-esteem, damage to her reputation, medical expenses, and the loss of vested pension rights.

Dorothy Davis filed a Complaint in the United States District Court for the Western District of Missouri on May 5, 1998. The Complaint included a claim under 42 U.S.C. § 1983 for wrongful discharge in violation of her First Amendment right to free speech, and a claim for improper discharge in violation of Missouri law for "whistleblowing." The Complaint named as Defendants Robert Nichols, Individually, and in his capacity as Director; Charlene Davis, Individually and in her capacity as Director; Thomas J. Walsh, Chairman; Sharon K. Spence, Secretary; William C. Alumbaugh, Member; Roxana Hauser, Member; Jackson County Board of Election Commissioners; and Jackson County Election Board. The Defendants filed answers to the Complaint. Dorothy Davis filed an Amended Complaint on May 27, 1999. The defendants eventually answered this complaint in June, 1999.

On August 9, 1999, the Defendants collectively filed a Motion for Summary Judgment. Dorothy Davis filed a response to the motion on September 2, 1999. The defendants filed a reply to that response on September 20, 1999.

The District Court held the matter sub curia and did not conduct a hearing on the Motion for Summary Judgment. On December 3, 1999, the District Court (Whipple, J.) granted summary judgment to the Defendants.

The District Court dismissed Dorothy Davis' claims with prejudice. The United States Court of Appeals for the Eighth Circuit affirmed in a one-page, unpublished, per curiam opinion.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DISTRICT COURT MISINTERPRETED DECISIONS OF THIS COURT IN RULING THAT A PUBLIC EMPLOYEE WHO WAS CONSTRUCTIVELY DISCHARGED AFTER EXPOSING A SUPERVISOR'S MISUSE OF PUBLIC FUNDS, EMPLOYEES' TIME, AND RESOURCES IN CARRYING OUT WORK FOR A NONPROFIT ASSOCIATION COULD NOT ESTABLISH A PRIMA FACIE CASE UNDER 42 U.S.C. § 1983 BECAUSE SHE DID NOT SPEAK ON A MATTER OF PUBLIC CONCERN

The District Court dismissed Dorothy Davis' § 1983 claim on the ground that she did not speak on a matter of public concern when she informed the members of the Election Board that her supervisor, Charlene Davis, had been requiring her to expend up to 80 percent of her time — as an accounting coordinator for the Jackson County Board of Election Commissioners — on matters relating to a nonprofit association of which Charlene Davis was serving as national treasurer.

The District Court justified its grant of summary judgment on the ground that Dorothy Davis did not speak about the work for the Association as a concerned citizen. In the court's view, she

> spoke to the Commissioners [at the July, 1997, meeting] solely for the purpose of asking them to reinstate her after she quit. Her comments about [the Association] came as a result of questions by the Commissioners about the type of work she performed. While it may be true that [her] answers about the amount of work she performed led to a public controversy among the Commissioners, she did not intentionally raise this matter because of its interest to the public. She simply acted as any employee would who was asking to be reinstated — she answered the questions asked by her bosses. Thus, the context and form of [her] comments about [the Association] reveal that [she] never truly exercised her First Amendment rights.

(District Court Opinion, pp. 6-7).

Even if one were to concede, for the sake of argument, that the District Court somehow properly divined Dorothy Davis' intent when she informed the Board of her inappropriate work for her supervisor's Association, one is forced to conclude that the District Court has misinterpreted the decisions of this Court regarding the First Amendment protections afforded to a public employee speaking out on a matter of public concern.

The First Amendment's guarantee of freedom of speech, while not absolute, protects government employees from termination because of their speech on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 146 (1983). To prevail in this action, the government employee must prove that the conduct at issue was (1) constitutionally protected; and (2) a substantial or motivating factor in the termination. If the employee discharges that burden, the government must show that it would have taken the same action even in the absence of the protected conduct. *See Board of County Commissioners v. Umbehr*, 518 U.S. 668, 675 (1996).

**A. The Speech Was Constitutionally Protected.**

Dorothy Davis' speech when she apprised the Board of her supervisor's inappropriate use of county resources was indeed constitutionally protected. The District Court's assertion that this was not speech within the meaning of the First Amendment — because it occurred in private — is groundless. This Court has made it clear that neither the First Amendment nor its interpretive decisions indicate that freedom of speech "is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979).

**B. The Speech Was a Substantial or Motivating Factor in the Dorothy Davis' Termination.**

The facts of this case clearly support this Court's observation that "[s]peech can be chilled and punished by administrative action as much as by judicial processes."

*Waters v. Churchill*, 511 U.S. 661, 669 (1994). Dorothy Davis' assertions, which must be taken as true for purposes of the summary judgment motion, demonstrated that she became the focus of her supervisor's wrath following the July, 1997, meeting and that her supervisor would stop at nothing in her attempt to bring about Dorothy's termination from her position. Dorothy's exemplary record up to that time inevitably casts doubt on her supervisor's sudden dissatisfaction with Dorothy's work after Dorothy exposed the misuse of public resources by her supervisor.

### C. The Speech Involved a Matter of Public Concern

The District Court's conclusion that Dorothy Davis' speech was not protected by the First Amendment because it represented only an attempt to save her job does not find any support in the decisions of this Court. This Court has long taken the position that whether the speech of a government employee is constitutionally protected expression requires striking

> a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Indeed, "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." 391 U.S. at 572.

In performing the balancing called for in *Pickering*, the court must not consider the employee's statement in a vacuum. The manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. *See Connick v. Myers*, 461 U.S. 138, 152-53 (1983). Pertinent considerations include whether the statement by the employee

- impairs discipline by superiors or harmony among co-workers;

- has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; or

- impedes the performance of the employee's duties or interferes with the regular operation of the enterprise. *See Pickering*, 391 U.S. at 570-73.

These considerations and the very nature of the balancing test "make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Dorothy Davis' statements to the Board in the July, 1997, meeting did not impair discipline in her department, harm the working relationships among her fellow employees, or impede the regular operation of the department. Neither *Pickering* nor any of its progeny support the reasoning or the conclusion of the District Court below.

Moreover, this Court's decisions do not support the District Court's conclusion that Dorothy Davis had not spoken out on a matter of public concern because she was

speaking in private to the Commissioners or the District Court's assertion that Dorothy Davis was not exercising her First Amendment rights because she was merely replying to questions put to her by her "bosses."

In short, the District Court, and by implication the Eighth Circuit, committed a miscarriage of justice in misapplying the long line of decisions handed down by this Court.

## II.

## THE EIGHTH CIRCUIT DENIED THE PETITIONER HER RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS BY SUMMARILY AFFIRMING, IN AN UNPUBLISHED PER CURIAM OPINION, THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT PURSUANT TO 8TH CIR. RULE 47B

This case exemplifies a trend in the federal courts today that many view with alarm. A public employee attempts to enforce her civil right when she is forced out of her job after raising matters of public concern. She retains an attorney, makes significant financial sacrifices to assert her rights, and finds that her case is dismissed with prejudice without her ever having her day in court. Indeed, her attorney, in opposing the defendants' motion for summary judgment, is not even granted oral argument by the District Court. The woman presses on, again at significant expense, and files an appeal to the Eighth Circuit. Her attorney prepares and files a comprehensive brief. In addition to compensating her attorney, the woman faces what most would regard as daunting costs of reproducing the record. The reward for her and her attorney's efforts is a one-page, per curiam opinion

by the Eighth Circuit, permitted by its Local Rule 47B, that summarily affirms the decision of the District Court, which in turn had decided the case without even entertaining arguments by counsel.

Faced with increasingly staggering case loads, the federal courts understandably have adopted procedures to summarily dispose of cases that they regard as less worthy or interesting. The question arises, however, whether in so doing the federal courts are trammeling upon the fundamental rights of litigants, as guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments, to have reasonable access to the courts to assert their rights and redress their grievances.

This Court ruled long ago that the "cryptic and abstract words of the Due Process Clause" require at a minimum "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added).

Dorothy Davis attempted to assert her rights under a civil rights statute, 42 U.S.C. § 1983, that has long protected citizens from overreaching by government officials. Yet neither she nor her attorney was ever afforded the opportunity to be heard in person, in District Court, to assert her rights.

This Court has repeatedly recognized that a fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity "must be granted at a reasonable time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The trend that this case exemplifies raises doubts about whether litigants such as Dorothy Davis are being granted the opportunity to be heard "in a meaningful manner" when their cases are disposed of summarily in District Court.

In examining the trend toward summary dispositions in many types of cases, this Court noted more than 40 years ago that such proceedings stood on shaky ground, historically speaking:

> The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures. Summary trials . . . may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even *ex parte*. Such summary trials, it has been said, were practically unknown to the English common law and it may be added that they have had little acceptance in this country. In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.

*New Hampshire Fire Insurance Co. v. Scanlon*, 362 U.S. 404, 406-07 (1960).

And yet the trend in recent decades has been to permit more and more summary dispositions of cases in District Court. As in this case, this has been made possible by the increasing willingness of the District Courts to use such tools as summary judgment without even granting an opportunity for oral argument. The Courts of Appeals have implemented

local rules in some Circuits that permit them to dispose of appeals in a few sentences by merely alluding to the correctness of the District Court's opinion.

The authors of the widely respected treatise on federal courts took note of this trend and expressed cautious concern in this way:

> Conspicuous among the local circuit practices during the past decade have been the development of rules to screen out appeals that are deemed not to warrant oral argument and to dispose summarily of increasing numbers of appeals, without written opinion or explanation. These are matters that the Appellate Rules largely leave to the discretion of the courts of appeals. But the overall effect of the circuit practices in these regards, combined with the growing number of circuit rules on other aspects of practice, is to elevate the importance of local practices and local circuit rules. The authority and the impact of the Appellate Rules are correspondingly depreciated.

16A Wright, Miller & Cooper, *Federal Practice and Procedure 3d* § 3993 (West Group 1999).

This is precisely what happened in this case. Relying on its Local Rule 47B, the Eighth Circuit disposed of Dorothy Davis' appeal with a figurative wave of the hand. In affirming summarily the decision of the District Court below, the Court of Appeals gave its tacit approval to a process that denied Dorothy Davis her day in court, but even more disturbing, did so without ever permitting her attorney to attempt to orally persuade the lower court.

This Court should grant certiorari in this case to address the Due Process implications of court procedures that increasingly process litigants' cases with the efficiency of meat-packing plants. The canard that one should not watch laws or sausages being made is taking on a new dimension as federal district courts and courts of appeals find ever more "efficient" ways to dispose of our citizens' cases without ever having to see or listen to the litigants, their attorneys, or their witnesses.

Surely, the framers of our Constitution did not envision so antiseptic and impersonal method of dispensing justice. Courts have struggled for centuries to determine what Due Process actually means, but even casual observers of our federal court system, if asked, would undoubtedly reply that what passes for justice in many cases nowadays falls far short of Due Process.

## CONCLUSION

For the reasons stated above, the undersigned respectfully requests that this court issue a writ of certiorari in this matter.

Respectfully submitted,

THERESA D. O'TOOLE
Law Offices
Seven Main Street
Parkville, Missouri 64152
(816) 505-1600

MARION E. WINTER
*Counsel of Record*
Winter Law Office
Seven Main Street
Parkville, Missouri 64152
(816) 505-1600

*Attorneys for Petitioner*

# APPENDIX

**APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED OCTOBER 11, 2000**

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

No. 00-1258

Dorothy D. Davis,

Appellant,

v.

Robert Nichols, Individually, and in his capacity as Director; Charlene Davis, Individually, and in her capacity as Director; Thomas J. Walsh, Chairman; Sharon K. Spence, Secretary; William C. Alumbaugh, Member; Roxana Hauser, Member; Jackson County Board of Election Commissioners; Jackson County Election Board,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 15, 2000
Filed: October 11, 2000

*Appendix A*

Before BOWMAN, BEAM, and BYE, Circuit Judges.

PER CURIAM.

Dorothy Davis brought a § 1983 action and a related state action under Missouri law against the Jackson County Board of Election Commissioners and various other parties. Ms. Davis claimed that she was constructively discharged in retaliation for engaging in speech protected by the First Amendment. The District Court[1] granted summary judgment for all defendants.

We have reviewed the order of the District Court and conclude that no error of law appears. The judgment of the District Court is affirmed for the reasons stated in that court's order. *See* 8th Cir. Rule 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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1. The Honorable Dean Whipple, Chief Judge, United States District Court for the Western District of Missouri.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED DECEMBER 3, 1999

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

Case No. 98-0620-CV-W-1

DOROTHY D. DAVIS,

Plaintiff,

v.

ROBERT NICHOLS, et al.,

Defendants.

**ORDER**

Plaintiff Dorothy D. Davis ("Plaintiff") has sued her former employer, the Jackson County Election Board ("Election Board"), for allegedly violating her First Amendment rights and constructively discharging her in violation of public policy. Plaintiff's two-count complaint also names the four Commissioners and two Directors of the Election Board ("Commissioners" and "Directors") in their official and individual capacities. Defendants have moved for summary judgment on grounds that Plaintiff's First Amendment rights were never violated, that the Commissioners and Directors are entitled to qualified

immunity, and that Plaintiff was not constructively discharged. Defendants argue that Plaintiff never spoke about any matter of public concern that would implicate First Amendment considerations, and that, even if she did, the individual Defendants could not have reasonably understood her comments to be of public concern. Defendants also argue that Plaintiff's working conditions were not intolerable, were not intended to oust her, and did not motivate her decision to resign. For the following reasons, Defendants' motion for summary judgment is GRANTED.

## I. FACTUAL BACKGROUND

The Election Board hired Plaintiff as Accounting Coordinator in 1993. As Accounting Coordinator, Plaintiff was responsible for administering the Election Board's accounts and assisting the auditor used by the Election Board's during routine election audits. Although Plaintiff was employed at the will of the Election Board's four Commissioners, she worked under the close supervision of its two Directors. Charlene Davis has served as a Director for twenty-one years. Robert Nichols has served as a Director for fourteen years.

In 1995, Director Charlene Davis became Treasurer for the International Association of Clerks, Recorders, Election Officials, and Treasurers ("IACREOT"), a national professional organization for individuals working in the listed positions. IACREOT offers different activities and/or events in which its members can voluntarily participate; it also holds several meetings every year in various United States cities. Besides Director Davis, other Election Board employees,

including Commissioners, have participated in IACREOT. Plaintiff also participated in IACREOT, but her participation was primarily at the direction of Director Davis. Plaintiff spent a significant portion of her job assisting Director Davis with bookkeeping and administrative functions for IACREOT. She also traveled to IACREOT conferences.

On July 14, 1997, the Election Board's auditor was conducting a routine election audit at the Election Board's offices. During the audit, Plaintiff spent a great deal of time on the telephone with her teenage daughter, who was struggling with Plaintiff's recent divorce. Plaintiff asked to go home, and was told by Director Davis that she needed to stay to assist the Election Board's auditor. Plaintiff immediately quit and left work.

On July 18, 1997, Plaintiff met with the Commissioners in a special executive session to ask for reinstatement. In reference to her behavior on July 14, Plaintiff explained to the Commissioners that she was under a good deal of stress at home and at work. During the course of her discussion with the Commissioners about being reinstated to her position with the Election Board, the Commissioners asked Plaintiff how much time she spent working on IACREOT issues. She told them she spent approximately 80 percent of her time on IACREOT.

Although the Commissioners reinstated Plaintiff, her revelation about the amount of work she and other Election Board employees were doing for IACREOT apparently disturbed them. The Commissioners passed and distributed a new policy prohibiting Election Board employees from

working for volunteer organizations during business hours. They also requested that the Jackson County auditor perform an audit of IACREOT participation by Election Board employees. Ultimately, the auditor reported approximately $226.00 in long-distance telephone calls that could not be accounted for. The Commissioners asked the Directors to determine whether the long-distance telephone calls had been made for Board purposes or IACREOT purposes. There was a great deal of internal controversy and strife among the Commissioners and Directors over this IACREOT issue.

Meanwhile, Plaintiff returned to work on July 21, 1997. She was reprimanded and placed on six months probation for her behavior on July 14. Plaintiff has acknowledged that she understood these punitive actions to be related to her July 14 behavior and that she believed them to be reasonable. However, Plaintiff alleges that other events occurred following her return to work that made her work environment intolerable. Plaintiff complains that Directors Nichols and Davis: (1) prohibited her from copying documents for removal from Election Board offices; (2) required her to speak to a supervisor rather than leaving a voice message when she called in sick; (3) asked her to account for long-distance telephone calls that she made from her telephone at the Election Board office; and (4) extended her probationary period for another six months because of her excessive personal calls, thereby making her ineligible for a two-percent cost of living increase. Plaintiff further alleges that these events were not isolated, but were reflective of a hostile environment that she believes was in retaliation for her IACREOT revelations. Plaintiff specifically points to the friction on the Election Board concerning IACREOT and

claims that the Directors were upset with her on account of the revelations she made on July 18.

Almost immediately after Plaintiff returned to work, she began looking for another job. She received an offer from King's Management in early March 1998, and tendered her resignation to the Election Board on March 9. Plaintiff left the Election Board shortly thereafter and currently works for King's Management.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554-55, 91 L. Ed. 2d 265 (1986). The facts and inferences from those facts are viewed in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-90, 106 S. Ct. 1348, 1355-58, 89 L. Ed. 2d 538 (1986). The moving party must carry the burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. *Id.*

Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e); *Lower Brule Sioux Tribe v. State of S.D.*, 104 F.3d 1017, 1021 (8th Cir. 1997). To

determine whether the disputed facts are material, courts analyze the evidence in the context of the legal issues involved. *Id.* Thus, the mere existence of factual disputes between the parties is insufficient to avoid summary judgment. *Id.* Rather, "the disputes must be outcome determinative under prevailing law." *Id.* (citation omitted). Furthermore, to establish that a factual dispute is genuine and sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. Demanding more than a metaphysical doubt respects the proper role of the summary judgment procedure: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555.

## III. DISCUSSION

### A. Plaintiff's First Amendment Claim

Plaintiff's primary claims against Defendants is that they violated her First Amendment rights by retaliating against her after she told the Commissioners that Election Board time was used on IACREOT matters. To maintain her First Amendment retaliation claim under 42 U.S.C. § 1983, Plaintiff must initially demonstrate by a preponderance of the evidence that (1) her speech was constitutionally protected, (2) she suffered an adverse employment action, and (3) a causal connection exists between her speech and

the adverse employment action, so that it can be said that her speech was a motivating factor in the determination. *See Mount Healthy City Sch. Dist. Bd. of Educ. v. Dovie*, 429 U.S. 274, 283-87, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Defendants argue that Plaintiff cannot establish a prima facie case because she did not speak on a matter of public concern.

The question of whether certain speech enjoys a protected status under the First Amendment is one of law, not fact. *See Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S. Ct. 1684, 1691, n.7, 75 L. Ed. 2d 708 (1983). Central to this inquiry is whether the speech may "be fairly characterized at constituting speech on a matter of public concern." *Connick*, 461 at 146, 103 S. Ct. at 1690; *Buazard v. Meridith*, 172 F.3d 546, 548 (8th Cir. 1999); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993). As a general rule, speech on "any matter of political, social, or other concern to the community" is protected by the First Amendment. *Connick*, 461 U.S. at 146, 103 S. Ct. 1690. In addition to the content of speech, however, courts must also look at the "form and context of a given statement" to determine whether it is entitled to First Amendment protection. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690. When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern. *See Buazard v. Meridith*, 172 F.3d at 548, *Day v. Johnson*, 119 F.3d 650, 657 (8th Cir. 1997); *Bausworth*, 986 F.2d at 1198-99. Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment. *Buazard*, 172 F.3d at 548. An employee's complaint against her public employer is not itself sufficient to transform the dispute into a matter

of public concern, even though the public may be concerned with the employment practices of the governmental entity. *See e.g. Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, 721 (6th Cir. 1989) ("[T]he First Amendment does not convert every public employee grievance into a matter of public concern . . . ."), *rev'd on other grounds*, 497 U.S. 1001, 110 S. Ct. 3232, 111 L. Ed. 2d 744 (1990).

Based on the controlling law, summary judgment must be granted on Plaintiff's claim. Plaintiff never spoke about IACREOT as a concerned citizen. She spoke to the Commissioners solely for the purpose of asking them to reinstate her after she quit. Her comments about IACREOT came as a result of questions put to her by the Commissioners about the type of work she performed. While it may be true that Plaintiff's honest answers about the amount of work she performed led to a public controversy among the Commissioners, she did not intentionally raise this matter because of its interest to the public. She simply acted as any employee would who was asking to be reinstated — she answered the questions asked by her bosses. Thus, the context and form of Plaintiff's comments about IACREOT reveal that Plaintiff never truly exercised her First Amendment rights. The fact that she was a public employee does not automatically transform her private complaints and responses as an employee into matters of public concerns entitled to First Amendment protection. *See e.g. Buazard*, 172 F.3d at 548-549 (refusing to extend First Amendment protections to internal statements police officer gave at request of police chief; police officer's refusal to change statements when chief requested followed from his duty as police officer). In the midst of stating private concerns as an employee, Plaintiff

stumbled upon an issue that others perceived to be of public interest. Her comments are not entitled to First Amendment protection; § 1983 cannot remedy whatever alleged injustice subsequently occurred.

**B. Plaintiff's Constructive Discharge Claim**

In addition to her § 1983 claim, Plaintiff alleges that Defendants wrongfully and constructively discharged her. To recover under this claim, Plaintiff must establish (1) that Defendants intentionally made her working conditions so intolerable that she had no choice but to resign, and (2) that Defendants' actions were wrongful. *Nichols v. American Nat. Ins. Co.*, 945 F. Supp. 1242, 1245-46 (E.D. Mo. 1996) (denying wrongful discharge in violation of public policy claim as duplicative); *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo. Ct. App. 1998) (recognizing constructive discharge in action for wrongful discharge based upon public policy exception to employment-at-will doctrine). Plaintiff's claim fails on both elements.

First, Plaintiff was not constructively discharged. She alleges no set of facts that would allow a reasonable juror to find that Defendants made her work environment intolerable for the purpose of forcing her to resign. *See Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825, 828 (Mo. Ct. App. 1997) ("An employer constructively discharges an employee when the employer 'deliberately renders the employee's working conditions intolerable and thus forces her to quit her job.' " (quoting *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995))). Plaintiff acknowledges that her two probations were related to her unacceptable behavior

on July 14, 1997 and her excessive personal phone calls; they were unrelated to her comments about IACREOT on July 18, 1997. Plaintiff cannot reasonably call intolerable her Directors' request that she account for her long-distance telephone calls. Moreover, Plaintiff has failed to show any causal relationship between her IACREOT comments and the hostility she felt from Director Davis, which was just as likely the result of Plaintiff's tantrum on July 14. Plaintiff cannot base her constitutional claim on the mere existence of friction between Commissioners on a politically charged Election Board. In short, Plaintiff has failed to make out a prima facie case for constructive discharge because there is no evidence that would allow a reasonable juror to find that her work environment was intolerable or that Defendants were intent on causing Plaintiff to resign.

Second, even if Plaintiff could establish a prima facie case that she was constructively discharged by Defendants, she cannot establish that Defendants actions were wrongful. At-will employee such as Plaintiff may not maintain a claim for wrongful discharge because employees at will may be terminated with or without cause. *Nichols*, 945 F. Supp. at 1245-46. Missouri does recognize a narrow public policy exception to this rule. "An at-will employee may state a claim under Missouri's public policy exception when an employer's act of discharging the employee violates a statute, a regulation based on a state, or a constitutional provision." *Saffels v. Rice*, 40 F.3d 1546, 1550 (8th Cir. 1995). Plaintiff alleges that her comments about IACREOT fall under the category of "whistle-blowing" protected by Missouri's public policy exception. *See* First Amended Complaint at ¶ 30. As the Court has already found, however, Plaintiff was not

attempting to "blow the whistle" on Defendants at IACREOT. She was merely trying to get her job back and answered a simple question from her bosses. Plaintiff's revelations about IACREOT did not expose any violation of statute, regulation, or even internal policy. Subsequent to her comments, the Election Board Commissioners decided they did not want employees working for IACREOT on Election Board time and instituted a new policy. This scenario does not, as a matter of law, fall within Missouri's public policy exception to termination at will.

## IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendants' motion for summary judgment on both of Plaintiff's claims against them. This action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

s/ Dean Whipple
Dean Whipple
United States District Judge

Date Dec. 3, 1999